86-2048

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

HORACE GREELY THOMPSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CHARLES MERLE GILE
Counsel of Record
VONDA L. WILKINS
GILE & GILE
2909 Northwest 31st Street
Oklahoma City, Oklahoma 73112
(405) 947-4453

Counsel for Petitioner

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4 copies

QUESTIONS PRESENTED

Petitioner pled guilty to conspiracy to commit mail fraud pursuant to a plea agreement under which no further criminal charges were to be brought for similar acts. On motion of the government and over Petitioner's objection, the information was dismissed and the plea agreement voided. Three days later Petitioner was indicted for the same acts.

The questions presented are:

(A) Does the plea of guilty followed by the order voiding the plea agreement present a colorable double jeopardy claim for purposes of an immediate appeal from the order denying Petitioner's motion to dismiss the subsequent indictment?

(B) Did jeopardy attach upon the trial court's acceptance of Petitioner's guilty plea?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on March 25, 1987.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 814 F.2d 1472 and is reproduced as Appendix "A" hereto.

JURISDICTION

The jurisdiction of this Court is respectfully invoked pursuant to the authority of 28 U.S.C. §1254(1) and Rule 20.1, Rules of the Supreme Court of the United States. The opinion of the United States Court of Appeals for the Tenth Circuit was filed on March 25, 1987 and the timely filed Petition for Rehearing was denied on April 20, 1987. This Petition for Certiorari was filed within sixty (60) days of that date.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. §1291 provides in pertinent part:

> "The Court of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in Sections 1292(c) and (d) and 1295 of this Title [28 U.S.C.S. §§1292(c) and (d), 1295]."

The Fifth Amendment to the Constitution of the United States provides in part as follows:

> ". . . .nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . . "

Rule 32(d) of the Rules of Criminal Procedure states as follows:

> "**Plea Withdrawal.** If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. §4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. §2255."

STATEMENT OF THE CASE

Horace Greely Thompson entered into a written pretrial agreement with the United States Attorney for the Western District of Oklahoma. Pursuant to said plea agreement, Petitioner, Mr. Thompson, was required to waive grand jury indictment and plead guilty to one felony count of Conspiracy to Give False Statements to the Department of Housing and Urban Development (18 U.S.C. §371).

On July 3, 1985, approximately two years after entering said pretrial agreement, Petitioner entered his guilty plea to the Honorable Lee West in the Western District of Oklahoma to one count of Conspiracy to Commit Mail Fraud (18 U.S.C. §1341). The information alleged that certain overt acts were committed, to-wit: the mailing of checks for the following amounts on the dates set forth:

February 21, 1980	$ 8,077.06
July 9, 1980	$22,564.49
December 5, 1980	$27,476.79
December 15, 1980	$ 6,006.41
April 8, 1981	$ 2,080.00
July 28, 1981	$ 6,240.00
August 28, 1981	$12,480.00
October 20, 1981	$ 2,080.00
December 11, 1981	$ 2,080.00
March 12, 1982	$ 6,240.00

When Petitioner pled guilty on July 3, 1985, the United States Attorney set forth the agreement that Petitioner had at that time with the government as follows:

> "**Mr. Korotash:** Your Honor, the substance of that agreement is that in return for the defendant's plea of guilty to this information, that

no charges will be brought against this defendant in the Western District of Oklahoma for any criminal acts that may have been committed by this defendant in connection with construction of any projects financed by the Indian Housing Authority or in connection with any offenses that may have been committed in connection with any investigation conducted into Mr. Thompson's conduct in relation to any of the Indian Housing construction projects.

Further, Your Honor, it was agreed by the government that in return for the defendant's plea to this particular information, that no charges of the type just set forth now in terms of the construction project would be brought against the defendant's son in this case, Mr. Rick Thompson.

* * * * *

The Court: With that understanding that this is the complete agreement, the court will accept that plea agreement."

The guilty plea was unconditionally accepted pursuant to Rule 11, Federal Rules of Criminal Procedure and sentencing was deferred until a presentence report was received by the court.

On August 30, 1985, the government filed its motion to void the pretrial agreement, alleging that Petitioner had failed to cooperate pursuant to the pretrial agreement. There had been no mention at the time of accepting Mr. Thompson's guilty plea that he should further cooperate with the government. Petitioner had entered into a pretrial agreement on August 9, 1983 and had cooperated for approximately two years prior to entering his guilty plea.

A hearing was had before the Honorable Lee West in the Western District of Oklahoma on September 13, 1985. Although no evidence or sworn testimony was taken and over the objection of Petitioner, Judge West dismissed the information, voided the pretrial agreement and in effect withdrew Petitioner's guilty plea. An appeal was perfected from this order to the Tenth Circuit Court of Appeals.

On September 16, 1985, Petitioner was indicted on nine counts, eight counts of mail fraud (18 U.S.C. §1341) and one count of conspiracy to defraud the United States Department of Housing and Urban Development (18 U.S.C. §371). The eight mail fraud counts alleged the following checks were mailed on the dates set forth:

December 5, 1980	$27,476.69
April 8, 1981	$ 2,080.00
July 28, 1981	$ 6,240.00
August 28, 1981	$12,480.00
October 20, 1981	$ 2,080.00
December 11, 1981	$ 2,080.00
March 12, 1982	$ 6,240.00

All of these acts were alleged in the original information.

Count eight alleged the mailing of an invoice on March 3, 1981.

On November 6, 1985, Petitioner filed his motion to dismiss the subsequent indictment based on double jeopardy grounds, which was overruled on November 27, 1985. An appeal was perfected to the Tenth Circuit Court of Appeals from the order overruling Petitioner's motion to dismiss, which was consolidated with Petitioner's appeal from Judge West's September 13, 1985 order voiding the pretrial agreement.

The Tenth Circuit Court of Appeals in effect held that Petitioner's appeal did not present a colorable claim of double jeopardy for purposes of an immediate appeal. Although assuming for purposes of Petitioner's appeal that jeopardy had attached upon his plea of guilty, the court held that the counts charged in the indictment were not the same counts to which Petitioner pled guilty pursuant to the information filed on July 3, 1985.

The Tenth Circuit further held that even if Petitioner had presented a colorable claim of double jeopardy, the order denying Petitioner's motion to dismiss the indictment was not immediately appealable. The Court reasoned that "[a] plea agreement involves a qualitatively distinct type of jeopardy from that which attaches after a trial and conviction." Appendix A, p. A-15.

REASONS FOR GRANTING THE WRIT

The Fifth Amendment's guarantee against being twice put in jeopardy for the same offense has been an elusive concept in American jurisprudence. The judicial system has long struggled to determine the extent of the guarantee, and more particularly the time in the course of the criminal prosecution at which jeopardy attaches.

It is clear that the Double Jeopardy Clause protects against more than being twice punished for the same offense. The guarantee against being "twice put in jeopardy" also extends to protect against a second prosecution for the same offense after conviction. *North Carolina v. Pearce*, 395 U.S. 711 (1969).

This Court in *Abney v. United States*, 431 U.S. 651 (1977) held that an order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of 28 U.S.C. §1291, and thus immediately appealable. In reaching this deci-

sion, this Court recognized that the Petitioner was challenging "the very authority of the Government to hale him into court to face trial on the charge against him." *Abney*, supra, at 659. To force the accused to stand trial before allowing an appeal would result in the loss of the Double Jeopardy Clause's protection against a second prosecution. This Court ruled that only by allowing an immediate appeal would an accused be assured of the full protection of the Clause.

This Court has never ruled on the issue whether an order denying a motion to dismiss an indictment on double jeopardy grounds following a prior plea of guilty is immediately appealable. The rationale in *Abney* indicates that it is. The Tenth Circuit Court of Appeals held that it is not. This case presents an opportunity for this Court to determine the constitutional implications of the Double Jeopardy Clause in relationship to a prior guilty plea which was subsequently withdrawn over the accused's objection.

I.

THE TENTH CIRCUIT'S REFUSAL TO ASSUME JURISDICTION OVER PETITIONER'S APPEAL REPRESENTS A NARROWING OF THIS COURT'S DECISION IN *ABNEY V. UNITED STATES*, 431 U.S. 651 (1977).

The Tenth Circuit Court of Appeals' holding that Petitioner was not entitled to an immediate appeal from the trial court's order denying his motion to dismiss the indictment clearly conflicts in principal with this Court's decision in *Abney*. In *Abney*, this Court held that such an order was immediately appealable when the accused had undergone a previous trial. The Tenth Circuit distinguished the instant case from *Abney* on the basis that Petitioner had not been subject to the risk inherent in a trial and thus

had not presented "similar double jeopardy concerns" as those present in *Abney*.

The Tenth Circuit stated that its holding "is a product of the very balancing of competing concerns which *Abney* indulged." Appendix A, p. A-17. However, in reaching its decision, the Tenth Circuit ignored the rationale of this Court in holding that such orders are immediately appealable. *Abney* does not support the decision of the Tenth Circuit that the jeopardy which attaches upon conviction based upon a plea of guilty is inherently different from the jeopardy which attaches upon conviction following trial. Rather, *Abney* recognizes that the full protection of the Double Jeopardy Clause can only be afforded an accused if he is allowed an immediate appeal. If the accused is forced to trial before his appeal can be taken, he will have lost much of the guarantee's protection. He will have been "forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Abney* at 663.

The holding in *Abney* is clear:

> "[I]f a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs."

The conflict between the Tenth Circuit's decision and the rationale in *Abney* could not be more complete. This Court should accept certiorari to correct the lower court's erroneous interpretation of the constitutional mandate of the Double Jeopardy Clause.

II.

THERE IS A SPLIT AMONG THE CIRCUIT COURTS ON THE ISSUES PRESENTED IN THIS CASE, WHICH SHOULD BE RESOLVED BY THIS COURT.

There is also a split among the circuit courts regarding whether a pretrial order denying a motion to dismiss an indictment on the grounds that a former plea agreement prohibits bringing the charges is immediately appealable. The Tenth Circuit, addressing this issue in a footnote, declared that such claims are not immediately appealable. However, the Second Circuit Court of Appeals has held that the order is immediately appealable on due process grounds. *United States v. Abbamonte,* 759 F.2d 1065 (2d Cir. 1985); *United States v. Alessi,* 536 F.2d 978 (2d Cir. 1976), *cert. denied* 429 U.S. 960.

In *Alessi,* the defendant pled guilty pursuant to a plea agreement to one count of conspiracy to violate the federal narcotics laws. Subsequently, he was indicted for failure to file federal income tax returns. The defendant filed a motion to dismiss the indictment, which was denied. He appealed, arguing that the subsequent prosecution was barred by the prior plea agreement. The Second Circuit held that the order denying the motion to dismiss was immediately appealable. In so holding, the court specifically addressed and disagreed with the argument which the Tenth Circuit found persuasive in the instant case:

> "The government argues that *Beckerman* [a 2d Cir. case holding a motion to dismiss based on double jeopardy grounds immediately appealable] should be restricted to those situations where the defendant has already undergone the trauma of a first trial and should be inapplicable where, as here, Alessi pleaded guilty to the earlier indictment. Even were we to ac-

> cept the debatable proposition that there is less stress involved in pleading guilty than in standing trial, we fail to see how the distinction bears any relevance to the purposes of the Double Jeopardy Clause . . ."

The Second Circuit also held that the government is estopped from relying upon the fact that the defendant pled guilty in the prior conviction, rather than being convicted following trial. The Court held that the government, having negotiated for the defendant's waiver of a jury trial, could not then argue the fact that the defendant had pled guilty, rather than having been tried and convicted, in support of its claim that the order was not immediately appealable.

Likewise, in *United States v. Abbamonte,* the Second Circuit affirmed its holding in *Alessi* that an order denying dismissal of an indictment on grounds of violation of a prior plea agreement was appealable, holding that an immediate appeal is available when the defendant is asserting a right to be free not only from the burdens of a conviction but also from the burdens of a trial.

To the contrary, see *United States v. Eggert,* 624 F.2d 973 (10th Cir. 1980); *John Doe Corp. v. United States,* 714 F.2d 604 (6th Cir. 1983); and *United States v. Bird,* 709 F.2d 388 (5th Cir. 1983).

The split among the circuit courts on the issue of whether an immediate appeal is available to an accused who has been denied on his motion to dismiss an indictment grounded on a violation of a prior plea agreement raises an important and recurring federal question. This case presents an opportunity for this Court to address the issue of whether a defendant will suffer irreparable harm if he is denied an immediate appeal, and to establish a clear precedent for the lower courts.

III.

THE 1983 AMENDMENT TO RULE 32(d), FEDERAL RULES OF CRIMINAL PROCEDURE, PRESENTS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT.

In 1983, Rule 32(d), Federal Rules of Criminal Procedure, was amended to provide that a court "... may permit withdrawal of the plea upon a showing *by the defendant* of any fair and just reason" (emphasis added). Prior to 1983, the Rule did not include the qualifying language of "by the defendant."

It is Petitioner's contention that by amending the rule to provide for withdrawal of a plea of guilty after a showing by the accused of good cause, the intent was to preclude withdrawal of the plea upon motion by the government. Petitioner maintains that the trial court acted without authority in granting the government's motion in this case. Therefore, his guilty plea remains in effect and acts as a bar to his subsequent indictment.

In its opinion below, the Tenth Circuit refused to rule on the issue, holding that the accused must wait until after his trial on the second indictment to appeal the trial court's ruling which effectually withdrew the defendant's guilty plea. However, this issue is an integral part of Petitioner's double jeopardy claim, which, if found valid, would prohibit the government from forcing Petitioner to go through the burden of a trial in the second prosecution. It is this type of claim which this Court in *Abney* found to be immediately appealable.

The Tenth Circuit held that Petitioner had not presented a colorable claim of double jeopardy because the charges in the indictment were not the same offenses as the one to which he had pled guilty.

However, Petitioner claims that the subsequent charges were barred not only by his guilty plea but by the plea agreement.

An important federal question exists regarding the authority of a trial court to withdraw a defendant's plea of guilty upon motion by the government and over the defendant's objection. This court is urged to accept certiorari to provide clear guidelines to the lower courts in interpreting Rule 32(d), Federal Rules of Criminal Procedure, as amended in 1983.

IV.

THE CONFUSION AMONG THE LOWER COURTS REGARDING WHEN JEOPARDY ATTACHES UPON A PLEA OF GUILTY PRESENTS A QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT.

As set forth above, the Tenth Circuit in its decision below did not reach the issue of whether jeopardy attached upon Petitioner's plea of guilty to the original information. The Tenth Circuit merely held that Petitioner's claim was not immediately appealable.

Petitioner urges that if this Court grants certiorari and holds that Petitioner's claim presents a colorable claim of double jeopardy and thus is immediately appealable, it should also accept certiorari to determine if jeopardy had attached upon the trial court's acceptance of Petitioner's guilty plea.

There is much confusion among the lower courts on this issue. In fact, there is even a conflict *within* the Tenth Circuit Court of Appeals. In *United States v. Combs,* 634 F.2d 1295 (10th Cir. 1980), *cert. denied,* 451 U.S. 913 (1981), one judge held jeopardy to attach on sentencing, one judge determined jeopardy at-

tached when the guilty plea was accepted, and one judge did not reach the issue.

Several circuits have decided that jeopardy attaches upon the trial court's acceptance of the accused's guilty plea. In *United States v. Jerry,* 487 F.2d 600 (3d Cir. 1973), the Third Circuit held that jeopardy attached upon the acceptance of the defendant's guilty plea, but that the defendant waived his double jeopardy protection by his motion to withdraw, causing the plea to be set aside.

The Ninth Circuit has held that jeopardy attaches upon the trial court's acceptance of a plea of guilty "under some circumstances." *Adamson v. Ricketts,* 789 F.2d 722 (9th Cir. 1986), citing *United States v. Vaughan,* 715 F.2d 1373 (9th Cir. 1983).

In *Burgess v. Griffen,* 743 F.2d 1065 (4th Cir. 1984), the Fourth Circuit Court of Appeals agreed with the lower court's reasoning that jeopardy had attached when the defendant pled guilty, and any alleged breach of a plea agreement had no effect on the defendant's conviction, citing *Burgess v. Griffen,* 585 F.Supp. 1564 (W.D.N.C. 1984).

See also *United States v. Bullock,* 579 F.2d 1116 (8th Cir. 1978), *cert. denied,* 439 U.S. 967; and *United States v. Hecht,* 638 F.2d 651 (3d Cir. 1981), which held that jeopardy attaches upon acceptance of the guilty plea.

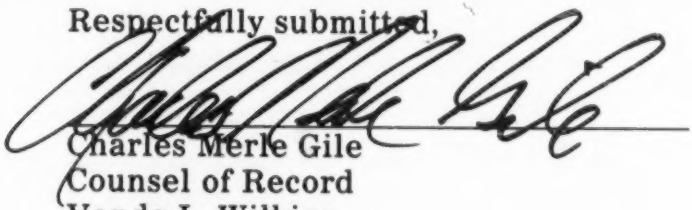
The First Circuit proposed a unique solution to the double jeopardy implications of a plea of guilty. In *United States v. Cruz,* 709 F.2d 111 (1st Cir. 1983), the court analogized a judicially withdrawn plea of guilty to the situation where a mistrial occurs after jeopardy has attached in a jury trial. This would allow a court to rescind acceptance of a guilty plea upon a showing of manifest necessity without subjecting the defendant to double jeopardy.

As shown by the above decisions, the resolution of this troublesome issue has resulted in a state of confusion and conflict among the lower courts. The scope of a defendant's constitutional guarantee to the protection afforded by the Double Jeopardy Clause at this point in time is determined by the judicial circuit in which he is charged. The numerous decisions in the courts below indicate that this issue is a recurring one. Consideration of the issue by this Court is essential.

CONCLUSION

For all of the above reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Charles Merle Gile
Counsel of Record
Vonda L. Wilkins
Gile & Gile
Counsel for Petitioner
2909 Northwest 31st Street
Oklahoma City, Oklahoma 73112
(405) 947-4453

Appendix A: OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Nos. 85-2422
	)	85-2867
HORACE GREELY THOMPSON,	)	
	)	
Defendant-Appellant.	)	

Appeal From the United States District Court
For the Western District of Oklahoma
(D.C. Nos. CR-85-139-W and CR-85-25-T)

C. Merle Gile, Oklahoma City, Oklahoma, for Defendant-Appellant.

Robert Mydans, Assistant U.S. Attorney (William S. Price, United States Attorney, and Stephen J. Korotash, Assistant U.S. Attorney, on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before BARRETT, McKAY and MOORE, Circuit Judges.

McKAY, Circuit Judge.

On July 3, 1985, pursuant to a plea agreement, defendant, Horace G. Thompson, pled guilty to a one-count information of conspiracy to commit mail

fraud. The court accepted the guilty plea but deferred sentencing. Two months later, before sentencing, the Government moved to set aside the plea agreement on the ground that defendant had violated the agreement. The district court granted the Government's motion and dismissed the information. Defendant appealed from the dismissal. A grand jury subsequently indicted him on eight counts of mail fraud and one count of conspiracy to defraud the United States. Defendant then moved to dismiss the indictment on double jeopardy grounds, alleging that the indictment charged him with the same offense to which he had already pled guilty. The district court denied the motion, and defendant appealed. Both appeals are now before this court.

The issues in the first appeal are (1) whether an order vacating the plea agreement and dismissing the information is immediately appealable as a final judgment, and (2) if so, whether the trial court properly vacated the plea agreement.

The issues in the second appeal are (1) whether defendant is entitled to an interlocutory appeal of the pretrial order denying his motion to dismiss the indictment, and (2) if defendant is entitled to an appeal, whether or not the indictment is barred on double jeopardy grounds.

The right to appeal is created by statute. For defendant to be able to appeal at this time, therefore, his appeals must fall within either the statutory provision or the common-law exception to the statute. Federal law permits appellate courts to review "all final decisions of the district courts . . . ." 28 U.S.C. §1291 (1982), and courts have strictly adhered to the policy of finality to avoid piecemeal review. *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982). "Adherence to this rule of finality has been particularly stringent in criminal prosecutions be-

cause 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.' " *Abney v. United States,* 431 U.S. 651, 657 (1977) (quoting *DiBella v. United States,* 369 U.S. 121, 126 (1962)).

I.

Defendant argues that the district court orders to vacate the plea agreement and to dismiss the information are final orders and, therefore, immediately appealable. We first address the trial court's dismissal of the information. In a criminal case, a decision is not final until both conviction and imposition of sentence. *See Flanagan v. United States,* 465 U.S. 259, 263 (1984); *Berman v. United States,* 302 U.S. 211, 212 (1937); *United States v. Romero,* 642 F.2d 392, 397 (10th Cir. 1981). Thus, the district court's order dismissing the information is not a final order, because it neither convicted nor sentenced defendant, and he has not been convicted since.[1] Moreover, the Supreme Court has specifically held a dismissal without prejudice to be an interlocutory step in the prosecution. *Parr v. United States,* 351 U.S. 513, 518 (1956).

In *Parr,* petitioner was indicted in one division of the Federal District Court for the Southern District of Texas. The trial court granted his motion to transfer the case to another division. The Government subsequently obtained a new indictment in a different division and moved to dismiss the original indictment. Petitioner appealed from the trial

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[1] Defendant may argue that his guilty plea was a conviction, *see Boykin v. Alabama,* 395 U.S. 238, 242 (1969), and therefore a final decision. The argument is flawed, however, because when the information was dismissed, the guilty plea was also dismissed. Record, vol. 3, at 12-14. Moreover, even were we to accept his guilty plea as a conviction, sentencing was never completed.

court's grant of the motion to dismiss. The Supreme Court affirmed the appellate court's decision that it had no jurisdiction to hear an appeal from the dismissal of an indictment. Looking at the indictments first in isolation and then as part of the same prosecution, the Court found no basis for petitioner's claim of jurisdiction to appeal.

Because the information and indictment in this case are in two separate proceedings,[2] we rely on the Court's initial analysis in Parr. Like petitioner in *Parr,* Mr. Thompson was not injured by the dismissal of the information because the judgment was terminated in his favor, and only one who has been injured by a judgment may seek review on appeal. *Id.* at 516-17. "So far as petitioner's standing to appeal is concerned, it makes no difference whether the dismissal still leaves him open to further prosecution .... The testing of the effect of the dismissal order must abide petitioner's trial, and only then, if convicted, will he have been aggrieved." *Id.* at 517.

Defendant fares no better with his argument that vacation of the plea agreement was a final order. By vacating the plea agreement, the court neither convicted defendant nor sentenced him. Thus, the court's decision was not a final order for purposes of appeal. As with the dismissal order, we believe that "[t]he testing of the effect of the [vacation] order must abide petitioner's trial...." *Id.* Thus, neither the vacation of a plea agreement nor the dismissal of an information are properly before this court as appeals from a final decision.

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[2] Although the Government requested that the court dismiss without prejudice, it had not previously attempted to obtain a superseding indictment against defendant. Three days after the information was dismissed, defendant was then indicted.

Moreover, defendant's claim merits no further consideration under the "collateral order" exception first articulated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). A collateral order may be considered a final decision for purposes of section 1291 if it fits within the narrow group of claims "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. Generally, the Supreme Court narrowly interprets this exception and, in criminal cases, has permitted interlocutory appeal of a pretrial order in only three instances in its name.[3] The Court has already foreclosed Mr. Thompson's argument with respect to the information dismissal. *Parr*, 351 U.S. at 519. Therefore, we are left with the issue of whether voiding a plea agreement falls within the collateral order exception.

The Supreme Court has outlined three factors that must be satisfied in order to qualify an order for interlocutory appeal. To determine whether vacation of a plea agreement falls within that small group satisfying the exception, we must consider whether it (1) conclusively determines the disputed question, (2) resolves an issue completely collateral to the cause of action, and (3) would be effectively unreviewable on appeal from final judgment. *Abney*, 431 U.S. at 658.

The Supreme Court emphasized the importance of the third factor when it noted that each applica-

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[3] Those orders are: (1) denial of a motion to reduce bail, *Stack v. Boyle*, 342 U.S. 1, 6 (1951); (2) denial of a pretrial motion to dismiss an indictment on double jeopardy grounds, *Abney v. United States*, 431 U.S. 651, 659 (1977); and (3) denial of a Congressman's motion to dismiss criminal charges because he was immune under the speech and debate clause, *Helstoski v. Meanor*, 442 U.S. 500, 506 (1979).

tion of the exception to the finality doctrine involved "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Hollywood Motor Car Co.*, 458 U.S. at 266 (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)) (appeal from denial of motion to dismiss indictment for violation of right to a speedy trial is not entitled to interlocutory review because the protection is only from delay, not from the trial itself). Although defendant was subsequently indicted after the court's vacation of the plea agreement, that indictment is not before us in this first appeal. The appeal before us challenges only the order to vacate the plea agreement. Therefore, this appeal is from one who has not been injured by the trial court's action; rather, defendant was released from his guilty plea, with no guarantee that a new grand jury would again indict him if the Government chose to pursue it. More to the point than the absence of injury, however, the plea vacation is not "effectively unreviewable on appeal from final judgment" under *Cohen* and its progeny. Simply put, the issue of whether defendant violated the plea agreement, the only substantive issue before us on this first appeal, can be fully reviewed and redressed by this court on direct appeal if defendant is eventually convicted. *See United States v. Eggert*, 624 F.2d 973, 975-76 (10th Cir. 1980) (per curiam) (denying interlocutory appeal of district court's denial of motion to dismiss indictment when the argument underlying defendant's motion was that the Government had violated a prior plea agreement). Defendant may be awarded any relief to which he is entitled at that time. There is no justification to consider defendant's claims before then. Because the district court's order in this case clearly does not meet the third *Abney* factor, we need not consider whether it meets the other two. This first appeal is therefore dismissed for lack of final judgment.

II.

In his second appeal, defendant claims that the indictment filed against him should be dismissed on double jeopardy grounds. The double jeopardy clause of the fifth amendment prohibits successive prosecution for the same offense after acquittal or conviction and prohibits multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Defendant alleges that jeopardy attached when he pled guilty to the information charging him with conspiracy to commit mail fraud under 18 U.S.C. § 371 (1982). He therefore would face double jeopardy if he is tried under the subsequent indictment charging him with one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and eight counts of mail fraud in violation of 18 U.S.C. § 1341 (1982).

The district court denied defendant's motion to dismiss on the ground that the separate prosecutions of defendant did not violate the fifth amendment. The court held that the offenses charged in the indictment were distinct from those to which he pled guilty, requiring differing essential elements of proof. The court also noted that it doubted jeopardy had attached in this case.

The denial of defendant's motion to dismiss generally is not immediately appealable under 28 U.S.C. § 1291 (1982). *United States v. Ritter*, 587 F.2d 41, 43 (10th Cir. 1978). However, the Supreme Court has allowed interlocutory review in certain instances when the motion to dismiss is based on a violation of the double jeopardy clause. *Abney*, 431 U.S. at 662.

A.

To be considered under the *Abney* exception, defendant's motion to dismiss must first present a colorable claim that he may be twice prosecuted for

the same offense. *Richardson v. United States,* 468 U.S. 317, 322 (1984); *MacDonald,* 435 U.S. at 862. Defendant then shoulders the burden to establish the facts supporting his motion. *Eggert,* 624 F.2d at 975. In this case, therefore, defendant must demonstrate that the offense to which he pled guilty is the same as the offense for which he was indicted. *United States v. Combs,* 634 F.2d 1295, 1296 (10th Cir. 1980), *cert. denied,* 451 U.S. 913 (1981).

The Supreme Court delineated the test for determining whether two offenses are the same for purposes of double jeopardy in *Blockburger v. United States,* 284 U.S. 299 (1932). "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied . . . . is whether each provision requires proof of a fact which the other does not." *Id.* at 304.

Defendant argues that the alleged overt acts are the same — both the information and the indictment allege violations of 18 U.S.C. §§ 371, 1341 (1982) — and both offenses require the same proof. Reply Brief of Defendant-Appellant at 7-8. His argument with respect to the eight counts of mail fraud in the indictment is clearly wrong on its face. "[T]he commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both." *Pereira v. United States,* 347 U.S. 1, 11 (1954); *see also Iannelli v. United States,* 420 U.S. 770, 777 (1975).

Defendant's claim that the indictment's conspiracy charge is commensurate with the conspiracy charge to which he pled guilty cannot be considered colorable either. Although the district court correctly held that the two conspiracy charges required differing elements of proof, it did not elaborate on the elements. We will therefore explore the differences.

Both the information and indictment charged defendant with violating section 371.[4] However, the information alleged conspiracy to commit mail fraud, while the indictment alleged conspiracy to defraud the United States by impeding the lawful functions of the United States Department of Housing and Urban Development. This court has stated that conspiracy to commit mail fraud requires the Government to prove: (1) that a conspiracy to defraud existed, (2) that the defendant was a party to the conspiracy, and (3) performance of an act or acts constituting use of the mails in furtherance of the conspiracy. *United States v. Lynn,* 461 F.2d 759, 761 (10th Cir. 1972). Conspiracy to defraud the United States, on the other hand, requires (1) proof of an agreement to defraud the United States; and (2) proof that one or more persons acted in pursuit of that objective. *United States v. Browning,* 723 F.2d 1544, 1546, (11th Cir. 1984); *United States v. Booty,* 621 F.2d 1291, 1297 (5th Cir. 1980); *United States v. Downen,* 496 F.2d 314, 318 (10th Cir.), *cert. denied,* 419 U.S. 897 (1974). Hence, "each provision requires proof of a fact which the other does not." *Blockburger,* 284 U.S. at 304. Conspiracy to commit mail fraud requires the Government to show an act constituting use of the mails in furtherance of the conspiracy. Proof of conspiracy to defraud the United States has no requirement regarding the use of the mails, but requires proof of an agreement to specifically defraud the United States.

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[4] The statute provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. 18 U.S.C. § 371 (1982).

Similarly, because each conspiracy offense includes an element that the other does not, neither charge can be considered a lesser-included offense of the other. *See Brown,* 432 U.S. at 167-68. Thus, defendant has not presented a colorable double jeopardy claim, and his claim does not merit consideration of an interlocutory appeal.

B.

There is an equally compelling reason to dismiss this appeal as premature, even were we to assume that defendant has a colorable claim. We are not convinced that defendant's claim properly falls within the confines of the *Abney* exception.

In *Abney,* defendants were charged with conspiracy and attempt to violate the Hobbs Act. Despite challenges to the indictment based on the duplicity of offenses, the trial court allowed the Government to proceed with both theories and required it to establish the elements of both offenses. The jury returned a guilty verdict. The Third Circuit reversed the convictions on appeal, because certain evidence had been admitted without adequate authentication, and ordered a new trial. The court also instructed the Government to choose between the conspiracy and attempt charges on remand. The Government chose to proceed on the conspiracy charge. Defendants then moved to dismiss the indictment because retrial would expose them to double jeopardy and because the modified indictment failed to charge an offense. The district court denied the motion, and the Third Circuit affirmed.

The Supreme Court permitted an interlocutory appeal from the pretrial order denying dismissal of the indictment, because the motion for dismissal was based on double jeopardy grounds. The Court first stressed the strict policy, particularly in criminal cases, to permit appellate review only of final deci-

sions. The policy is designed to prohibit disruptions that accompany intermediate appeal which in turn discourage effective administration of the criminal law. *Abney,* 431 U.S. at 657. Although the order in *Abney* lacked traditional finality, the Court held that it fell within the "small class of cases" entitled to interlocutory appellate review. *Id.* at 659. Applying the *Cohen* three part test, the Court first concluded that the order was final with respect to defendants' double jeopardy claim, because defendants had no further steps to take before having to face a trial which they claimed was constitutionally prohibited. Second, the Court determined that the double jeopardy issue was collateral to the principal issue at trial, because it was independent of defendants' guilt or innocence. The third, and most important, element of the *Cohen* test is whether the defendants' rights would be effectively abridged if review were postponed until after a final decision. The Court held that a double jeopardy claim presented just such a case.

> To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. *It is a guarantee against being twice put to trial for the same offense.*

Id. at 660-61 (emphasis in original). The Court noted that the purpose underlying the double jeopardy clause is to prohibit the State, with its superior power and resources, from repeatedly attempting to convict an individual for an alleged offense, "thereby subjecting him to embarrassment, expense

and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Id.* at 661-62 (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)).

In the case at bar, defendants advance a similar claim, but under different circumstances. In *Abney*, the defendants previously faced prosecution in a trial and had been convicted when they appealed. On appeal, their convictions were reversed and the case remanded. Thus, on remand, defendants faced a second trial, possibly for the same offense. Here, however, defendant pled guilty pursuant to a plea agreement, and his guilty plea was accepted. Defendant then allegedly breached the plea agreement. Consequently, the trial court granted the Government's motion to dismiss the information and vacate the guilty plea.[5] If we were to assume that the offense to which defendant pled guilty is the same as that in the indictment, the issue is then whether *Abney* requires this court to review a pretrial order denying a motion to dismiss an indictment when the underlying double jeopardy contention rests on a claim that

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[5] Although this appeal involves a plea agreement, it is distinguishable from cases that hold an appeal cannot be taken from a pretrial order denying a motion to dismiss in which the motion is based on a claim that a former plea agreement prohibits bringing the charges alleged in the indictment. Such a claim is based on due process grounds and not double jeopardy. *See John Doe Corp. v. United States*, 714 F.2d 604, 606 (6th Cir. 1983); *United States v. Bird*, 709 F.2d 388, 392 (5th Cir. 1983); *United States v. Eggert*, 624 F.2d 973, 975 (10th Cir. 1980). *But see United States v. Abbamonte*, 759 F.2d 1065, 1070 (2d Cir. 1985) ("an order denying dismissal of an indictment and rejecting a claim that trial was barred by a prior plea agreement was immediately appealable"); *United States v. Alessi*, 536 F.2d 978, 980-81 (2d Cir.) (same), *cert. denied*, 429 U.S. 960 (1976).

the acceptance of defendant's guilty plea constituted adequate former jeopardy.[6]

"[T]he mere recitation of the term 'double jeopardy' in the motion to dismiss does not bring defendant's appeal within the *Abney* exception." *Eggert,* 624 F.2d at 975 (quoting *United States v. Ritter,* 587 F.2d 41, 43 (10th Cir. 1978)). For this appeal to fall within the *Abney* exception, it must present similar double jeopardy concerns — concerns that are important enough to outweigh the strict policy of finality in criminal cases. The Supreme Court in *Abney* focused its concern on the possibility defendant would face a second trial. In a criminal trial, defendant proceeds on the ground he is innocent. He is made to withstand the duration of the trial, not knowing whether he will be convicted or acquitted. If the indictment contains more than one charge, defendant is in peril of being found guilty of one charge, the lesser charge, the greater charge, or guilty of multiple offenses. The Court underscored these considerations in *Abney* when it commented: "Because of this focus on the 'risk' of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." *Abney,* 431 U.S. at 661. The personal strain results not only from not knowing the outcome, but also from the adversarial process at trial, in which the parties are diametrically opposed. The purpose of

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[6] We recognize that there is some debate within this circuit concerning the point at which jeopardy attaches in a guilty plea. *See United States v. Combs,* 634 F.2d 1295 (10th Cir. 1980) (Judge Logan, writing for the court, held jeopardy to attach on sentencing; Judge McKay determined jeopardy attached when the guilty plea was accepted; Judge Breitenstein did not reach the issue), *cert. denied,* 451 U.S. 913 (1981). For purposes of this discussion, we will assume that jeopardy attached to defendant.

double jeopardy is to protect the defendant from a second adversarial proceeding in which he is again forced to put forward his case, to prevent him from being subject to yet another trial.

A guilty plea pursuant to a plea agreement, on the other hand, does not place defendant in the same situation as does a trial. A guilty plea is not part of the adversarial process; it is the result of pretrial negotiation. *Bordenkircher v. Hayes,* 434 U.S. 357, 362-63 (1978). Although the process may include confrontation, the Supreme Court has characterized it as a "give-and-take negotiation . . . between the prosecution and defense, which arguably possess relatively equal bargaining power." *Parker v. North Carolina,* 397 U.S. 790, 809 (1970). "Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher,* 434 U.S. at 363 (citation omitted).

These judicial comments illustrate the contractual nature of a plea agreement to which both parties negotiate so as to achieve a mutually beneficial result. The benefits defendant may receive reduce or eliminate the risks he faces at trial. The defendant knows what charge or charges of which he will be convicted — only those to which he pleads guilty. As a result of his plea, he may not be charged with other offenses that a prosecutor could have established at trial. Alternatively, other charges in his indictment may be dropped. A properly administered plea agreement allows a defendant to avoid "extended pretrial incarceration and the anxieties and uncertainties of a trial." *Blackledge v. Allison,* 431 U.S. 63, 71 (1977). In return for the benefits, defendant must undertake certain obligations. Defendant may agree to testify for the Government or provide other information. In either situation, defendant assumes

executory obligations he does not undertake in a trial.

A plea agreement involves a qualitatively distinct type of jeopardy from that which attaches after a trial and conviction. The most important value underlying the prohibition against double jeopardy is the prevention of Government harassment. *Green,* 355 U.S. at 187-88, *quoted in Abney,* 431 U.S. at 661-62; *Breed v. Jones,* 421 U.S. 519, 529-30 (1975); *Serfass v. United States,* 420 U.S. 377, 387-88 (1975); and *United States v. Jorn,* 400 U.S. 470, 479 (1971). If defendant pleads guilty pursuant to a plea agreement, he is far less likely to be subject to Government abuse. Since defendant negotiates with the Government, presumably from an equal bargaining position, the Government is in less of a position to harass the defendant. Furthermore, the double jeopardy protection is intended to prevent exposure to the *risk* of conviction. *Abney,* 431 U.S. at 661. If a defendant pleads guilty, he is not exposed to the risk of conviction. On the contrary, he knows exactly what will happen in the proceeding. Although defendant may suffer anxiety or embarrassment from a plea bargain and guilty plea, it is not the same anxiety or risk involved in a trial. The defendant who pleads guilty does not "run the gauntlet" in the same way a defendant who goes to trial does.

The jeopardy that attaches to a guilty plea is defined by the negotiated plea agreement. It is, in effect, negotiated as well. When the defendant enters into the plea agreement, he undertakes certain obligations and risks that he does not undertake in a trial. The defendant who derives the benefits from the agreement must accept the risks inherent in the conditions as well. The condition is the performance of the executory obligations that he assumes as the quid pro quo. The risk is that the satisfactory performance of his executory obligations may come into is-

sue. The resolution of that dispute is collateral to the merits of the defendant's guilt or innocence and requires different proofs relating to the contracted obligations rather than to the underlying charged crimes themselves. The trial and appeal of such issues implicates a different set of concerns than does a straightforward consideration of double jeopardy which focuses directly on the criminal charges in the first and proposed second trial. While some of the same concerns that led to *Abney* are present in the case of a voided plea agreement, not all of them are present. The voluntary advantages gained by the pleading defendant and the assumption of executory duties by agreement are all gained at a stage prior to trial, while it is the trial that greatly escalates the jeopardy of the accused.

The plea agreement, negotiated before trial, is distinguishable from the classic *Abney*-mandated interlocutory appeal and dictates a different result with respect to interlocutory appeal of double jeopardy claims bottomed on voided plea agreements. To the factors already mentioned in balancing the double jeopardy concerns in this situation, we add a concern that the issues involved in voiding a plea agreement are more complicated, usually requiring something akin to a trial and the subsequent review of factual determinations as well as legal issues. Given the contractual nature of the plea agreement and other advantages gained by the accused in the plea setting, we give greater weight to the traditional concerns about piecemeal appeals which were partially abrogated for limited purposes in *Abney*. Thus, we continue in the view that review of trial court decisions setting aside plea agreements must abide the trial of subsequent charges (if any) arguably covered by the plea agreement. We therefore hold that, to the extent double jeopardy claims are based on allegedly wrongfully voided plea agreements, appellate

review of the order voiding the agreement must await trial of the subsequent charges allegedly covered in the voided plea agreement. This judgment is a product of the very balancing of competing concerns which *Abney* indulged. We are satisfied that, in this special setting, the balance tilts in favor of those factors militating against interlocutory appeals.

We do not here conclude that when defendant enters into a plea agreement he risks forfeiture of his constitutional right not to be twice put in jeopardy. "[T]he Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment . . . ." *Abney,* 431 U.S. at 660. Defendant only risks forfeiting an authorized, interlocutory *Abney* appeal. Defendant does not even risk that forfeiture without a hearing. He can bring his claims of double jeopardy before the trial court. The trial court will review the claim and determine whether or not defendant met the terms of his agreement. If the trial court rules for the Government, any appeal must abide trial on the new charges. If the court refuses to void the plea agreement — not the situation in this case — and the Government persists in bringing charges arguably the subject of the plea, then *Abney* may well be applicable.

Therefore, we conclude that even if defendant presented a colorable jeopardy claim, we would not have jurisdiction to hear his appeal before the completion of the trial on the new charges.

DISMISSED.

Appendix B: OPINION BELOW

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Oklahoma City, Oklahoma
Dated: September 13, 1985

UNITED STATES OF AMERICA, Plaintiff	)	
vs.	)	Case No. CR-85-139-W
HORACE G. THOMPSON, Defendant	)	

TO: ALGUSSIE ROGERS, Acting Clerk

Please enter the following minute order in the above entitled case.

After hearing arguments of counsel and having examined the record in this case, plaintiff's motion to void plea agreement is GRANTED. The Court orders the information DISMISSED.

Counsel Notified ✓
Clerk to Notify xx

Lee West
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CR-85-25-T
	)	
JESSE OVERTON JAMES and HORACE GREELY THOMPSON,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court for consideration of defendant Horace Greely Thompson's motion to dismiss the indictment against him and alternative motion to stay these proceedings. The government has responded in opposition to the motions. Defendant's arguments will be addressed in seriatim.

Defendant contends this prosecution violates the double jeopardy prohibitions of the Fifth Amendment to the United States Constitution. The relevant facts are not in dispute.

On August 9, 1983, defendant entered into an agreement with the government. As part of that agreement, defendant consented to plead guilty to a one count information charging him with conspiracy to commit mail fraud. Defendant further consented to fully disclose all facts within his knowledge relating to the government's investigation and to testify truthfully at all grand jury proceedings. The government agreed not to present the matter to the grand jury, thereby not subjecting defendant to possible in-

dictment for other offenses arising out of his activities. Defendant entered this plea of guilty to the charge of violating 18 U.S.C. §371 on July 3, 1985.

On August 30, 1985, the government moved to set aside the plea agreement and to dismiss the information. The government contended defendant breached the agreement by changing his explanation for certain payments to defendant Overton James on the eve of his testimony. Defendant opposed the motions, asserting he had cooperated as contemplated in the agreement and was not refusing to testify. Following a hearing, the presiding judge granted both of the government's motions.

On September 16, 1985, defendant was charged by indictment with eight counts of mail fraud and one count of conspiracy to defraud an agency of the United States.

From the tenor of defendant's argument, it appears he is asserting that since the overt acts alleged in the information are factually identical to the facts alleged in the indictment, he is being charged twice for the same allegedly criminal conduct. He asserts this identity of facts constitutes a reprosecution prohibited by the Fifth Amendment. Defendant does not address the clear fact that he is not being charged a second time with conspiracy to commit mail fraud.

Upon consideration of the facts and circumstances, as well as the arguments advanced by the parties, the Court finds this prosecution is not in derogation of the Fifth Amendment. Proof of the crimes with which defendant is charged, mail fraud and conspiracy to defraud an agency of the United States, may substantially overlap the proof offered to establish the crime charged in the information, conspiracy to commit mail fraud. However, the statutory offenses are distinct, requiring proof of differing essential elements. Consequently, prosecution on

the indictment does not constitute a violation of the Fifth Amendment. *See Brown v. Ohio,* 432 U.S. 161, 53 L.Ed.2d 187 (1977) [holding prosecutions for statutorily identical offenses violative of the Fifth Amendment]; *and Blockburger v. United States,* 284 U.S. 299, 304, 76 L.Ed 306 (1932) [delineating test for determining identity of offenses]. Further, the Court finds the offenses charged in the indictment are not lesser included offenses of the crime to which defendant pleaded guilty. *Price v. Georgia,* 398 U.S. 323, 26 L.Ed.2d 300 (1970) [holding subsequent prosecution of greater offense following reversal of conviction of lesser included offense violative of Fifth Amendment]. Nor can the Court construe the dismissal of the information as an acquittal of defendant. *Compare United States v. Jenkins,* 420 U.S. 358, 43 L.Ed.2d 250 (1975). From the facts presented, the Court finds no evidence that this prosecution was occasioned by either dilatoriness or retaliation by the government. *Compare Downum v. United States,* 372 U.S. 734, 10 L.Ed.2d (1963); *Blackledge v. Perry,* 417 U.S. 21, 40 L.Ed.2d 628 (1974); *United States v. Worthey,* 736 F.2d 1429 (10th Cir., 1984). All of these factors militate against the conclusion that this prosecution is a violation of defendant's Constitutional rights.

Moreover, the Court finds there is a genuine issue whether former jeopardy attached at all in this instance. *See United States v. Combs,* 634 F.2d 1295, 1298 (10th Cir. 1980); and *United States v. Cruz,* 709 F.2d 111, 113-114 (1st Cir. 1983).

Defendant's motion to dismiss the indictment on the grounds of double jeopardy is denied.

Defendant's motion to stay these proceedings is based on the pendency of his appeal of the dismissal of the information. Defendant asserts that if he prevails, this prosecution would be void. The Court finds

the dismissal of the information is not clearly an appealable order. *See United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 73 L.Ed.2d 754 (1982); *and Flanagan v. United States,* U.S. , 79 L.Ed.2d 288 (1984). Under these circumstances, the Court finds defendant's alternative motion to stay should be and is hereby denied.

DATED this 27th day of November, 1985.

Ralph G. Thompson
UNITED STATES DISTRICT JUDGE

Appendix C: OPINION BELOW

MARCH TERM — April 20, 1987
Before Honorable Monroe G. McKay, Honorable James E. Barrett and Honorable John P. Moore

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff—Appellee,	)	
	)	
vs.	)	Nos. 85-2422
	)	85-2867
HORACE GREELY THOMPSON,	)	
	)	
Defendant—Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

The petition for rehearing is denied. Further, the suggestion for rehearing en banc is denied for failure to comply with Tenth Circuit Rule 35.2.

ROBERT L. HOECKER, Clerk

(2)

No. 86-2048

In the Supreme Court of the United States

OCTOBER TERM, 1987

HORACE GREELY THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

13pp

QUESTION PRESENTED

Whether petitioner's claim—that his prior (and now vacated) plea of guilty to a one-count information charging conspiracy to commit mail fraud raised a bar under the Double Jeopardy Clause to a subsequent indictment for substantive mail fraud and conspiracy to defraud the United States—was sufficiently colorable to permit an interlocutory appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-2048

HORACE GREELY THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 814 F.2d 1472. The memorandum opinion and order of the district court (Pet. App. B2-B5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1987. A petition for rehearing and suggestion for rehearing en banc was denied on April 20, 1987. The petition for a writ of certiorari was filed on June 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 9, 1983, petitioner entered into a plea agreement under which, in return for his truthful testimony, the government would charge him by information with, and he would plead guilty to, one count of conspiring to commit mail fraud, in violation of 18 U.S.C. 371 and 1341. On July 3, 1985, petitioner pleaded guilty in the United States District Court for the Western District of Oklahoma to that one-count information.

Petitioner's plea agreement required that he fully disclose all facts within his knowledge relevant to the government's investigation and testify truthfully at all grand jury proceedings. In addition, the plea agreement stated that if petitioner did not testify truthfully the agreement was void. On August 30, 1985, before petitioner's sentencing on his July 3 guilty plea, the government moved to set aside petitioner's guilty plea on the ground that he had breached the agreement by changing his testimony concerning a target of the investigation (see Pet. App. B3-B4). Though petitioner contended that he had complied with the plea agreement, the district judge found otherwise and granted the government's motion (see *id.* at B3). Petitioner appealed from the order dismissing the information and setting aside the guilty plea.

On September 16, 1985, a grand jury in the Western District of Oklahoma indicted petitioner on eight counts of mail fraud (18 U.S.C. 1341) and one count of conspiring to defraud the United States (18 U.S.C. 371). Before trial, petitioner moved to dismiss the indictment, arguing that the Double Jeopardy Clause barred the government from bringing the indictment. The district court denied the motion because the

charges in the indictment (substantive mail fraud and conspiracy to defraud the government) are not the same as the charge in the prior information (mail fraud conspiracy). Pet. App. B3-B4. Petitioner again appealed.

The court of appeals consolidated, and then dismissed, petitioner's appeals from the orders setting aside his guilty plea and denying his motion to dismiss the subsequent indictment on double jeopardy grounds. The court first held that the district court's order vacating petitioner's guilty plea and dismissing the information to which petitioner had pleaded guilty was not a final order, because it did not result in petitioner's conviction and because it left no pending charge against petitioner (Pet. App. A3-A6, citing *Parr* v. *United States*, 351 U.S. 513 (1956)).

The court of appeals also rejected petitioner's separate claim that the indictment should have been dismissed on double jeopardy grounds. The court agreed with the district court that petitioner's claim was not subject to interlocutory appeal because petitioner did not present a colorable double jeopardy claim. The court reasoned that the charge contained in the information to which petitioner had pleaded guilty and the charges in the indictment were not the same for double jeopardy purposes (Pet. App. A8-A10). According to the court of appeals, the substantive mail fraud charges in the indictment were clearly distinct from the mail fraud conspiracy charge in the previous information, based on the well-settled principle that a conspiracy and the underlying substantive crime are separate offenses. And the court found that the conspiracy to defraud the United States charged in the indictment was a separate offense from the mail fraud conspiracy charged in the in-

formation, because each offense required proof of a fact not required by the other (Pet. App. A8-A9, citing *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)).

The court then went on to describe what it saw as "an equally compelling reason to dismiss this appeal as premature, even were we to assume that defendant has a colorable claim" (Pet. App. A10). It held (*id.* at A16-A17) that, "to the extent double jeopardy claims are based on allegedly wrongfully voided plea agreements, appellate review of the order voiding the agreement must await trial of the subsequent charges allegedly covered in the voided plea agreement."

ARGUMENT

At the outset, petitioner seems to contend (Pet. 7-8) that under this Court's decision in *Abney* v. *United States*, 431 U.S. 651 (1977), the court of appeals was wrong in dismissing his interlocutory appeal on the ground that it did not present a "colorable" double jeopardy claim. This contention is without merit. A defendant in a criminal case may not convert an otherwise unappealable interlocutory order into an appealable order merely by claiming that the order violates the Double Jeopardy Clause. As this Court observed in *Richardson* v. *United States*, 468 U.S. 317, 322 (1984), a double jeopardy claim must at least be "colorable" before it will support a pretrial appeal under *Abney*.

In this case, the court of appeals correctly found that petitioner's motion to dismiss the indictment did not present a sufficiently colorable double jeopardy claim to support an interlocutory appeal. Nowhere in his petition does petitioner refute (or even acknowledge) the correct holdings of the district court

(Pet. App. B3-B4) and the court of appeals (*id.* at A8-A10) that the charge to which he had previously pleaded guilty—conspiracy to commit mail fraud—was not the "same offense" as any charge included in the present indictment, which alleges only substantive mail fraud and conspiracy to defraud the United States. Because petitioner has never been placed in jeopardy on the charges contained in the present indictment, he has no colorable double jeopardy claim.[1]

In any event, even when a defendant is, because of a finding that he breached a plea agreement, faced with trial on the *same* charge to which he has already pleaded guilty, the voided plea agreement cannot form the basis for a colorable double jeopardy claim. When a defendant contends that the prosecution has not abided by a plea agreement, it is the terms of the agreement, not the Double Jeopardy Clause, that define his rights. If a defendant pleads guilty to an offense, has that plea vacated because of what the government contends (and the trial court finds) is a breach of the plea agreement, and then is faced with trial for the same offense, the legality of proceeding with the trial depends entirely on whether there was a breach of the plea agreement and whether the agreement permits the reinstatement of charges in the event of a breach. The lawfulness of the trial in that setting does not turn on the protection that

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[1] Because jeopardy attached, if at all, only to the charge of conspiracy to commit mail fraud, and not to any of the charges in the present indictment, it is unnecessary for this Court to address the question raised in the petition (Pet. 12-14) as to when jeopardy attaches in the context of a guilty plea. In any event, the court of appeals assumed for purposes of its decision that this issue would be resolved in petitioner's favor, *i.e.*, that jeopardy *had* attached in the circumstances of this case (Pet. App. A13 n.6).

the Double Jeopardy Clause would provide in the absence of any agreement. See *Ricketts* v. *Adamson*, No. 86-6 (June 22, 1987), slip op. 6-10. For that reason as well, petitioner did not raise a colorable double jeopardy claim based on the district court's ruling that he had breached the terms of the plea agreement.

As an alternative to its holding that petitioner has no double jeopardy claim, the court of appeals ruled (Pet. App. A16-A17) that, "to the extent double jeopardy claims are based on allegedly wrongfully voided plea agreements, appellate review of the order voiding the agreement must await trial of the subsequent charges allegedly covered in the voided plea agreement." Whatever the merits of that alternative holding, it presents no reason for this Court to grant certiorari, since the judgment of the court of appeals is plainly correct for the independent reasons already discussed. "This Court * * * reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

Petitioner claims (Pet. 9-10) that the alternative holding of the court of appeals conflicts with the Second Circuit's decisions in *United States* v. *Abbamonte*, 759 F.2d 1065 (1985), and *United States* v. *Alessi*, 536 F.2d (1976). As the court of appeals correctly noted (Pet. App. A12 n.5), those cases permit a defendant to appeal when he claims "that a former plea agreement prohibits bringing the charges alleged in the indictment." [2] The issue in *Abbamonte*

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[2] No court other than the Second Circuit has found that such claims will support an interlocutory appeal. See *John Doe Corp.* v. *United States*, 714 F.2d 604, 606 (6th Cir. 1983); *United States* v. *Bird*, 709 F.2d 388, 392 (5th Cir. 1983);

and *Alessi*, however, was whether a prior, valid plea agreement was sufficiently broad in scope to prohibit the government from bringing the charges in the indictment. Neither *Abbamonte* nor *Alessi* nor any other federal case permits a defendant to take a pretrial appeal from a ruling that, because the defendant has breached his prior plea agreement, that agreement has ceased to bind the government not to bring charges. There is therefore no conflict between the decision in this case and the Second Circuit's decisions in *Abbamonte* and *Alessi*.[3]

United States v. *Rosario*, 677 F.2d 614, 615 n.4 (7th Cir.), cert. denied, 459 U.S. 867 (1982); *United States* v. *Eggert*, 624 F.2d 973, 974-975 (10th Cir. 1980).

[3] Petitioner briefly contends (Pet. 11-12) that the district court's order setting aside his guilty plea was not authorized by Fed. R. Crim. P. 32(d), which provides for withdrawal of guilty pleas at the request of the defendant. The government's motion, however, was authorized by Rule 48(a), Fed. R. Crim. P., not Rule 32(d). Under Rule 48(a), the government is entitled to move to dismiss an information, which is what occurred in this case; the court rejected the defendant's claim that the plea agreement barred the court from granting that relief, because the court found that the defendant's breach of the agreement left the government free to dismiss the information and bring any charges the government believed were appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

LOUIS M. FISCHER
Attorney

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